

**Testimony of Dawn Van Hoek
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**Committee on Judiciary
Michigan House of Representatives**

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Representative Constan, Representative Amash and other members of the Committee on Judiciary of the Michigan House of Representatives:

I am honored to represent the Michigan State Appellate Defender Office today to provide an appellate perspective on the cost of public defense neglect, and to suggest some solutions. We've been working for a long time on reform of the Michigan criminal defense system, largely from a constitutional perspective that focuses on due process and the right to counsel. Recently, I thought it would be interesting to consider a fiscal perspective, one that examines the costs and benefits of the way we handle criminal cases. It quickly became obvious that many current practices waste large amounts of money. In other words, taxpayers are getting a poor ROI, or return on investment.

Criminal defense policy has been neglected for decades in Michigan, lacking a built-in governmental champion. With the exception of SADO, no agency is tasked with ensuring that public funds for defense services are spent in an efficient, and constitutionally adequate, manner. No agency reviews or reports to a funder on whether good value is obtained for every dollar spent. No agency tracks the cost of mistakes, or considers loss prevention and the avoidance of waste.

The State Appellate Defender Office is uniquely positioned to provide at least some insight on systemic waste, as since 1969 it has represented thousands of defendants who have been convicted of felonies and chosen to appeal, in cases from every circuit court in the State. As the only state-funded public defender office in Michigan, SADO was part of a reform effort, 31 years ago, that led to creation of a governing commission, adoption of performance standards and caseload limits, and independence from the appointment process. SADO not only has three decades of experience with reviewing trial court practices, it is recognized as one of the nation's best defender offices, having just received the prestigious Foltz award from the National Legal Aid and Defender Association.

There are a number of "target-rich" environments in trial court practice, where reform could yield huge fiscal savings for Michigan taxpayers.

Sentencing errors

Let me describe sentencing in a typical criminal case. An assigned trial attorney counsels a guilty plea, which the defendant gives at a brief proceeding. Sentencing occurs a few weeks later, informed by a presentence report prepared by the overworked

probation department. The report contains the probation agent's summary of the offense, the defendant's prior record, scoring of statutory sentencing guidelines, and a recommendation. Defense counsel receives the report the same day as sentencing, and sees his client in a public lockup just minutes before sentencing takes place in open court. Because his caseload includes hundreds of clients, he can't remember much about this particular case or client. No sentencing memorandum is prepared by the defense to present mitigating circumstances or correct inaccuracies. The ensuing five-minute sentencing proceeding includes an opportunity for the defendant to speak, but the judge gives the clear impression that he has to "move the docket." The sentencing judge imposes a prison sentence that is higher than the guidelines-recommended minimum, largely because of the defendant's criminal record.

SADO is appointed as appellate counsel, obtains discovery of the defendant's criminal record, and discusses it with the client. Discovering that some of the scored convictions occurred more than 10 years before the sentencing offense, SADO files a motion for resentencing. Acknowledging the settled rule, the judge reduces the minimum sentence by 2 years. Reducing the minimum saves the Michigan Department of Corrections about \$64,000 in prison costs over the course of the incarceration.

This typical case scenario is repeated in dozens of courtrooms, in hundreds of cases, every working day of the year. Sentencing errors occur at an alarmingly high rate, regardless of whether preceded by trial or plea. In 2008, SADO's Plea Appeal Unit handled approximately 221 appeals from plea-based convictions, and SADO's Trial Appeal attorneys handled approximately 374 appeals from trial-based convictions. All cases involved thorough review of the sentencing process and result. In these 595 cases, 253 years were reduced from the minimum sentences imposed as a result of error correction by SADO attorneys. Plea Appeal Unit attorneys, who focus on sentencing relief, obtained relief for clients in approximately 50% of their appellate filings.

I want to be perfectly clear about the nature of sentencing errors that are corrected on appeal. They aren't some clever or esoteric claims that defense lawyers stay up late to dream up. They are legal issues, supported by statutes and case law: in fact, a judge can't change a sentence without recognizing that a legal mistake was made. Correcting a sentencing mistake means that a fact-based, accurate and proportionate sentence is imposed, one that legislators have determined is appropriate under our penal code and sentencing guidelines.

Assuming an average annual cost of incarceration of \$32,000,¹ sentencing error correction by SADO attorneys last year saved the State of Michigan at least **\$8,096,000** (253 years x \$32,000). This is real money, actually reducing the burden on taxpayers. It is also just the tip of the iceberg.

¹ House Fiscal Agency analysis of Medical Marijuana bill, 2008.

SADO attorneys represent about 25% of those persons pursuing an appeal each year. Assuming the same error correction rate (253 years for each 595 cases), for the remaining 3194 cases appealed in 2008, a potential savings of **\$43,459,872** $[(3194/595 \text{ cases} \times 253 \text{ years}) \times \$32,000 \text{ prison costs/year}]$ was realized by the advocacy of non-SADO assigned appellate attorneys. In this one-year sample involving criminal cases on appeal, the projected total saving in prison costs due to appellate correction of sentencing error is conservatively estimated at **\$51,555,872**.²

These are very conservative estimates of the cost of sentencing errors, since they capture only the cases on appeal, a small percentage of the total number of criminal cases reaching disposition in Michigan's trial courts, over 57,000 in 2008. Of that number, 9,716 were sent to prison. If we assume the same error correction rate (253 years for each 595 cases) for the total universe of cases involving commitments to prison, (9,716 in 2008), the cost of sentencing error is astronomical. A potential one-year savings of **\$132,202,917** would be realized $[(9,716/595 \text{ cases} \times 253 \text{ years}) \times \$32,000 \text{ prison costs/year}]$ if we could prevent sentencing error in all cases where a defendant is sent to prison.

Are these numbers for real? Absolutely. They represent the cost of incarceration which could have been avoided if mistakes did not occur in the first place, at the trial court level. If they didn't occur at the trial court level, the system would save not only the prison cost but also the cost of taking an appeal and litigating to correct the error, a figure that would also include the cost of appellate defense counsel and prosecutors, and the appellate courts.

Sentencing errors waste precious system resources that could be devoted to other uses.

Wrongful convictions

For cases in which a criminal defendant was exonerated, quantifying waste takes on greater dimensions: in addition to wasted costs of appeals and years in prison, civil judgments may dramatically increase the cost to taxpayers.

Consider the case of Eddie Joe Lloyd, who served 17 years in prison for a murder and rape he didn't commit before DNA testing proved his innocence and led to his release in 2002. Police interrogated Lloyd about the 1984 killing of a sixteen-year-old girl in Detroit after he wrote to them from the hospital, where he was receiving treatment for his mental illness. Lloyd offered suggestions on how to solve numerous murders. Police interrogators provided him with crime details not otherwise known, suggested that he could help them "smoke out" the real perpetrator, and obtained a signed confession. At trial, Lloyd's confession was played to jurors, who also heard evidence about semen found on clothing used to strangle the victim. Lloyd's jury

² MAACS assigns cases randomly, so there is no selection of more error-prone cases to go to SADO. Sentencing error rate should be uniform, since trial-level conduct is not influenced by who is assigned on appeal.

convicted him of first-degree murder after just one hour of deliberation. Fruitless appeals followed until Lloyd contacted The Innocence Project in 1995, seeking retesting of the biological evidence used at his trial. With help from the Wayne County Prosecutor's Office, independent testing by forensic Science Associates, and confirmation by the Michigan State Police Crime Lab, Lloyd was released in 2002 when he was excluded as the source of the biological evidence.

Detroit Free Press editors recently wondered, "How much would the state have saved if Lloyd had never been imprisoned in the first place?" When we chart the waste in the Lloyd case, based largely on ineffective assistance of counsel, we include not only the cost of his appeals, and the cost of his unwarranted 17 years in prison, but also the civil judgment obtained against the City of Detroit and other defendants. Lloyd's wrongful conviction suit was settled for \$4 million (\$3.25 million from the City of Detroit, \$600,000 from the State of Michigan, and \$200,000 from Wayne County). A conservative take on the money wasted on this one, unjust, prosecution is nearly \$5 million.

We are increasingly aware that such cases are far from rare. In fact, SADO recently received federal grants creating two units within the office intended to find and fix wrongful prosecutions, including those arising from problems in the now-closed Detroit Police Crime Lab. The growing list of Michigan innocence cases reveals the high cost of mistakes:

Defendant	yrs in prison	prison cost	civil judgment	total
Eddie Joe Lloyd	17	\$544,000	\$4 million	\$4.54
Kenneth Wyniemko	8.5	\$272,000	\$3.3 million	\$3.57
Walter Swift	26	\$832,000	pending	
Claude McCollum	2.5	\$80,000		
Larry Souter	13	\$416,000	amt. undisclosed	
Marvin Reed	8	\$256,000		
Nathaniel Hatchett	11	\$352,000		
David Tucker	5	\$160,000		
Harold Wells	1.5	\$48,000	\$20,000	

These 9 cases are the product of a system that fails to train or monitor the performance of, or adequately pay defense counsel, and that fails to provide the defense with investigators or experts who could expose wrongful prosecutions. The combined, and unnecessary, cost to the system is well over \$10 million; that extraordinary number does not even account for the cost of appellate attorneys, or appellate courts. And, for just these 9 cases, the combined total is likely to rise significantly as civil judgments are obtained. Finally, if Michigan passes its pending "wrongful incarceration" bill,³ authorizing compensation of exonerated defendants at the

³ HB 4790 and 4791, introduced 4-2-09. The federal government, the District of Columbia, and 27 states have compensation statutes of some form. <http://innocenceproject.org/Content/309.php>

rate of \$40,000 per year in prison, the cost will rise again. If applied to these 9 defendants, for their 92.5 wasted years in prison, the total compensated by the State of Michigan would be \$3,700,000.

A conservative estimate by national experts is that 1% of persons convicted of crimes are actually innocent. At the end of 2008, there were 48,686 individuals in Michigan prisons. Applying that 1% error rate in our state means that as many as 500 innocent people are imprisoned in Michigan, at an annual cost of \$16,000,000.

Ineffective Assistance of Counsel

SADO's well-trained appellate specialists review trial counsel's conduct and choices in hundreds of cases each year, a measure of "quality control." Trial counsel's performance is examined for its impact on the outcome, and for purposes of preserving claims for federal habeas review. Appellate claims of ineffective assistance of counsel are rising: SADO raised the claim in 14.3% of filings in 1981, and **48.4%** in 2008. The increase is partly due to the stringent requirements of the federal law on issue preservation, but also very much due to fewer resources for the defense, caseload pressures, low pay, and lack of training. Among the frequently seen types of IAC are trial counsel's failure to investigate or present a defense, or to challenge prosecution evidence.

A typical SADO case is that of Chamar Avery, charged with first-degree murder in Detroit, 2000, who told defense counsel that he was with a friend at an auto repair shop at the time of the shooting. His assigned attorney, carrying a heavy caseload, failed to present an alibi defense despite sending an investigator to talk with alibi witnesses. SADO held an evidentiary hearing claiming ineffective assistance, lost in state appellate courts, and then won federal habeas relief which was affirmed by the 6th Circuit Court of Appeals, with certiorari denied by the Supreme Court. It took nine years of appellate proceedings to correct the error, one that arose in a case that may well have resulted in an acquittal at trial. The cost to the system: \$288,000 in prison costs, plus costs of appeals.

The hostility of state appellate courts to ineffective assistance of counsel claims has only increased the cost of correcting errors caused by trial counsel's conduct. Relief is more frequently granted in federal court, where approximately **50** claims of IAC arising in state court proceedings have resulted in successful federal habeas corpus actions since 1996. These 50 cases are ones in which a well-resourced and competent defense would have led to a fair result, avoiding the high costs of appeals.

Loss Prevention: HB 5676

I also want to talk about the elements of HB 5676 that **must** be adopted in order to prevent sentencing error, ineffective assistance of counsel and wrongful conviction. They are largely the elements that have proved significant in improving the appellate defense system, which moved to partial state funding in 1978, thirty-one years ago. That year, the Appellate Defender Act was signed into law by Governor Milliken,

creating an Appellate Defender Commission charged with developing a system of indigent appellate defense services. That system was to include SADO, the state-funded public defender office, and a system of private assigned counsel that would be paid by counties, but overseen by an administrative office (MAACS). This commission-designed system included performance standards to which appellate counsel must adhere, continuing legal education, workload limits, and an appointment method which ensured independence of counsel from the appointing authority. It functions successfully to this day.

To consider elimination of wasteful practices is to consider their causes. In this regard, there is significant overlap in what leads to errors at sentencing, ineffective assistance of counsel and wrongful convictions.

- (1) **Lack of a stable and adequate funding source.** Counties using low bid contracts for defense services encourage high caseloads among those who do the work. We saw in the NLADA study, for example, assigned trial attorneys who carried caseloads suitable for two or three attorneys, at the same time that they served their private paying clients. Every hour spent on an assigned case under the contract is an hour away from a better-paying private client. Mistakes by counsel are much more likely when they are unable to spend adequate time on a case.
- (2) **Lack of training.** While some is provided by SADO, it is significantly less than is available to the state's prosecutors, who benefit from the state-funded services of the Prosecuting Attorneys Coordinating Council. Training from private providers is expensive, often beyond the reach of those attorneys taking low-paying assignments. And, because most of Michigan's assigned counsel are in private practice rather than in a public defender office, attending training takes time from attending to private paying clients. SADO estimates that the universe of assigned counsel turns over by one-third each year, producing a large number of attorneys who need training.
- (3) **Lack of oversight.** No process currently exists to review the performance of assigned counsel, other than the desire of an individual judge to stop appointing a particular individual. Attorneys may function at very low performance levels, even producing repeated findings of ineffective assistance of counsel, and face no adverse consequences.
- (4) **Lack of performance standards.** The complete absence of minimum standards for indigent criminal trial-level defense representation means that even well-intentioned attorneys lack guidance on best practices. We've seen successful IAC claims where attorneys fail to advise clients of plea offers, fail to investigate, or fail to obtain interpreters, all conduct that would be addressed in performance standards.
- (5) **Lack of resources for investigation or experts.** The most significant causes of wrongful convictions, which are often extremely costly and wasteful, are the inability to adequately investigate the prosecution's evidence or to present a defense theory. In some circuits assigned counsel operate in a culture where no requests for experts or investigators are granted. We've seen costly appellate litigation of a trial court's order that the defense could have an expert at \$60 an hour, while the

prosecution was able to pay \$120. Finding an expert who will work at assigned rates is difficult, even if a judge is willing to authorize it.

How does HB 5676 address these costly and mistake-producing practices?

Section 1(e) provides:

... that adequate state funding of the state public defense system is provided and managed in a fiscally responsible manner.

Section 7 requires the new commission to develop a plan that will:

(d) allocate sufficient personnel, resources, training, supervision, and physical facilities in each region to ensure the efficient provision of effective assistance of counsel to eligible individuals

Section 12 requires the commission to

(2) establish state standards for public defense services to ensure services are provided by competent counsel and in a manner that is fair and consistent throughout the state, including

(a) the level of education and experience required to provide effective representation, based on case complexity and severity of the charges and potential punishments

(b) acceptable workloads

(c) access to professional services, including paralegals, investigators, and expert witnesses

(d) access to technology and legal resources

(e) training and continuing education

(f) practice standards

(g) performance criteria

These elements of HB 5676 are the preventive measures that will stop costly errors. They will go a long way toward ensuring that sentences are accurate, lawful and not overly long, that competent counsel achieves a just result, and that the guilty do not go free while the innocent languish in prison.

Conclusion

What is a good return on investment (ROI) from a criminal justice system standpoint? It is when a case is tried just once, to an accurate and just result and sentence. ROI is poor when processes must be repeated, unnecessarily, at great public expense. Spending the minimal possible amount on criminal defense, Michigan's neglect of many years, generates large downstream costs in the forms of sentencing errors, wrongful prosecutions and ineffective assistance of counsel. We need to connect the dots and adequately fund the system, to prevent those errors.